

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES T. WARREN,)	Case No.: 3:08 CV 3029
)	
Petitioner)	
)	
v.)	JUDGE SOLOMON OLIVER, JR.
)	
ROBERT WELCH, Warden)	
)	
Respondent)	<u>ORDER</u>

On December 30, 2008, Petitioner James T. Warren (“Warren” or “Petitioner”) filed a petition for writ of habeas corpus (“Petition,” ECF No. 1) pursuant to 28 U.S.C. § 2254, challenging the constitutionality of his state conviction for involuntary manslaughter. Warren argues that his Petition should be granted based on the following grounds: (1) that the trial court violated his due process and equal protection rights by imposing more than the minimum sentence; and (2) that the sentence violated the Eighth Amendment because it was excessive. (*See* Petition at 6-8.) This court referred the case to Magistrate William H. Baughman, Jr. for preparation of a Report and Recommendation. On April 7, 2009, Respondent Robert Welch (“Respondent”) filed a Return of Writ, and on April 22, 2009, Respondent filed an Amended Return of Writ. (ECF Nos. 8, 12.)

On December 29, 2009, Magistrate Judge Baughman submitted his Report and Recommendation (ECF No. 13), recommending that judgment be entered in Respondent’s favor. First, he found that the Petition is procedurally defaulted because Warren did not timely file an appeal with the Supreme Court of Ohio. The Supreme Court of Ohio’s denial of a motion for leave to file a delayed appeal is a procedural ruling sufficient to bar federal court review of a habeas petition. *Stewart v. Russell*, 2009 WL 2391525, at *3 (N.D. Ohio July 29, 2009). He stated that,

“federal habeas court is precluded from reviewing a claim for relief if the petitioner failed to obtain consideration of that claim on its merits in state court, either because the petitioner failed to raise it when state remedies were still available or because of some other violation of a state procedural rule.” (Report and Recommendation, ECF No. 13, at p. 9) (citing *Lundgren v. Mitchell*, 440 F.3d 754, 763 (6th Cir. 2006).). Second, Judge Baughman found that Petitioner cannot show cause for the default and actual prejudice. *Deitz v. Money*, 391 F.3d 804, 808 (6th Cir. 2004). He further found that Warren did not fairly present an Eighth Amendment argument to the Ohio appeals court, so it cannot be considered in this court.

As of the date of this Order, Plaintiff has not objected to the Report and Recommendation. By failing to do so, he has waived the right to appeal the Magistrate Judge’s recommendation. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140 (1985).

The court finds that after *de novo* review of the Report and Recommendation and all other relevant documents, the Magistrate Judge’s conclusions are fully supported by the record and controlling case law. Accordingly, the court adopts as its own the Magistrate Judge’s Report and Recommendation. (ECF No. 13.) Warren’s Petition is hereby dismissed, and final judgment is entered in favor of the Respondent. The court further certifies that pursuant to 28 U.S.C. § 1915(a)(3), an appeal from this decision could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

January 29, 2010